# F.M.S. REPORTS.

[APPELLATE CRIMINAL JURISDICTION]

TERRELL, Ag. C.J (S.S.) AITKEN, J. and CUSSEN, J.

## YAP LIOW SWEE v. PUBLIC PROSECUTOR.

[IPOH CRIMINAL APPEAL No. 5 of 1937]

*The Motor Vehicles Enactment (Cap. 168), S. 45 (i), (ii), (iv)—driving recklessly or negligently in a manner which was dangerous to the public,—two separate offences—Criminal Procedure Code (Cap. 6), Ss. 164, 165 and 422—duplicity of charges—illegality.*

The appellant was convicted on a charge setting forth that he drove a motor bus "recklessly or negligently in a manner which was dangerous to the public," in contravention of Section 45 (i) of the Motor Vehicles Enactment (Cap. 168).

*Held*, (1) that inasmuch as Section 45 (i) created distinct and separate offences the conviction was bad for duplicity, and (2) that the irregularity was one that could not be cured under Section 422 of the Criminal Procedure Code.

*Jagar Singh* v. *Public Prosecutor*, (1936) F.M.S.L.R. 84; (1936) 5 M.L.J. 144 followed.

*Lee Chin Kee* v. *Public Prosecutor*, (1935) F.M.S.L.R. 33; (1935) 4 M.L.J. 157 dissented from.

Appellant did not appear.

*C. H. Whitton*, D.P.P., for the Respondent.

*Cur. Ad. Vult.*

**TERRELL, AG. C. J**—The facts and relevant sections are sufficiently set out in the Judgment of Cussen J. which I have had the advantage of reading, and with which I respectfully agree, and it is only necessary for me to refer to some of the authorities.

There are two points that arise on this appeal, (1) whether the charge is bad for duplicity, and (2) if there was duplicity, is that an irregularity which can be cured under section 422 of the Criminal Procedure Code, or is it an illegality which can only result in the conviction being quashed.

As regards duplicity, the leading English authority on the subject is the case of *Charles Wilmot*, 24 Cr.A.R., p. 63 where the Lord Chief Justice quotes with approval the following passage from the judgment of Avory J. in *Rex* v. *Surrey Justices ex parte Witherick*, (1932) 1 K.B., p. 450 at p. 452:

> "It is an elementary principle that an information must not charge offences in the alternative, since the defendant cannot then know with precision with what he is charged, and of what he is convicted, and may be prevented on a future occasion from pleading 'autrefois convict.'"

The learned Judge is of course referring to the "alternative" appearing in the same charge, and not to a charge in the alternative which, as was pointed out by Cussen J., is permissible in the F.M.S. under section 166 of the Criminal Procedure Code. It is clear that if there are charges in the alternative, the accused is not embarrassed in any way. He is called upon to plead to each charge separately, and if he is convicted on one charge he is automatically acquitted on the other.

The principle laid down in *Wilmot's* case has been followed by Sir Samuel Thomas C.J. in *Lee Chin Kee* v. *Public Prosecutor*, (1935) F.M.S.L.R., p. 33 at p. 34; (1935) 4 M.L.J. 157, and by Howes J. in *Jajar Singh* v. *Public Prosecutor*, (1936) F.M.S.L.R., p. 84 at p. 85, (1936) 5 M.L.J. 114 at p. 115. It has also been accepted by the Court of Criminal Appeal of the Colony in *Rex* v. *Teh Peng Kim* (Singapore Criminal Appeal 1/37) decided on 18th June 1937, but not yet reported.*

In the present case as has been pointed out by Cussen J. there are four possible offences under section 45(i) of the Motor Vehicles Enactment (Chapter 168 Revised Edition) viz:

(i) Driving recklessly
(ii) Driving negligently
(iii) Driving at a speed which is dangerous to the public etc.
and (iv) Driving in a manner which is dangerous to the public etc.

Section 45(i) appears to be derived from the Motor Act of 1903, section 1(i) of which, according to Lord Coleridge in *Rex* v. *Jones*, (1921) 1 K.B. p. 632, defined four separate offences. In that case the accused was charged with driving "recklessly *and* at a speed which was dangerous to the public etc." and it was held that the conviction must be upheld because he was not charged in the alternative, he was charged with driving both recklessly and at a dangerous speed, and the defendant's act was treated as one and indivisible (see p. 635). Accordingly in my opinion there might be no objection in law to a person being charged under section 45(i) of the Motor Vehicles Enactment with driving "recklessly *and* in a manner which was dangerous to the public etc.," but the prosecution would have to prove both elements of the charge, and if they failed to establish either recklessness or the danger to the public, the accused would be entitled to be acquitted.

In the present case the accused appears to have been charged under (i) (ii) and (iv) referred to above, the charge reading:—

"That you did drive motor bus H.N.S. 3091 recklessly or negligently in a manner which was dangerous to the public." Even if the word 'and' can be supplied after the word 'negligently' there is still the fact that the words "recklessly" and "negligently" are connected by the word "or." which results in a duplicity. I would suggest that in future charges under section 45(i) of the Enactment should set out clearly with which of the four offences it is intended to charge the accused. If it is doubtful which offence has been committed, there can be an alternative charge

* Since reported in (1937) 6 M.L.J. 173.

or charges, and the matter will be free from doubt.

In the Singapore case, *Rex* v. *Teh Peng Kim*, the accused was charged under section 477 of the Penal Code with "fraudulently or dishonestly destroying a valuable document" and was convicted of the attempt. In that case the Court of Criminal Appeal while citing with approval the decision in *Charles Wilmot*, 24 Cr.A.R. p. 63 held that there was no duplicity on the ground that the words "fraudulently or dishonestly" are not even separated by a comma and appear to be treated as different aspects of the same criminal intention, and that in substance there were not separate charges. On the other hand, "recklessly" and "negligently" obviously connote different things: and if both are alleged they should be the subject of separate and alternative charges. I do not therefore regard that decision as inconsistent in any way with a finding that the charge in the present case is bad for duplicity.

As regards the second point, whether the duplicity in the charge is a mere irregularity which can be cured, or an illegality, I respectfully agree with the opinion expressed by Howes J. in *Jajar Singh* v. *the Public Prosecutor* in preference to that expressed by Sir Samuel Thomas in *Lee Chin Kee* v. *The Public Prosecutor*.

The note in *Sohoni* referred to by Sir Samuel Thomas, which appears as note 7 p. 564 of the 13th Edition, does not deal with questions of "duplicity" such as arise in the present case. The cases there dealt with are cases of separate offences combined in a single charge, where the prosecution set out to prove each of such offences, and each offence could have been the subject of a separate charge. This has been held in British India to be an irregularity which is curable, unless it can be shown that the accused has been prejudiced, or that there has been a failure of justice, under a section which corresponds to section 422 of the F.M.S. Criminal Procedure Code. But in a case like the present the prosecution do not set out to prove both recklessness and negligence, but merely one *or* the other. Accordingly the accused is embarrassed in his plea and if he is convicted he is left in doubt as to the offence of which he has been convicted.

I have no doubt therefore that duplicity of this kind is an illegality, and that the appeal should be allowed and the conviction set aside. The fine should be refunded to the appellant.

**CUSSEN, J.**—The Appellant, Yap Liow Swee, was convicted in the Court of the Magistrate at Kuala Pilah, Negri Sembilan, of an offence under section 45 (i) of the Motor Vehicles Enactment (Cap. 168 Revised Edition) and fined $75 or 3 months R.I.

The Charge was as follows:—

> "That you on or about 12-9-36 at 12 noon at 41st mile Kuala Pilah-Bahau Road did drive motor bus H.N.S. 3091 recklessly or negligently in a manner which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road and thereby collided with a bull-pulling cart No. 324 N.S. and that you have thereby committed an offence punishable under section 45(i) Cap. 168 Revised Edition."

He appealed to the Court of the Judge, Seremban, on the following ground:—

> "The charge was bad for duplicity inasmuch as three different offences were included therein, and the case is covered by the decision in *Jagar Singh* v. *The Public Prosecutor* (F.M.S. Law Reports, January to June, 1936 p.84)."

The appeal coming before the Judge, Seremban, he made the following order:—

> "In view of the apparently conflicting decisions of Sir Samuel Thomas C.J. in *Lee Chin Kee* v. *Public Prosecutor*, 1935 F.M.S.L.R. 33 and of Howes J. in *Jagar Singh* v. *Public Prosecutor*, 1936 F.M.S.L.R. 84, I direct that this appeal be heard and determined by the Court of Appeal."

The Appellant did not appear before this Court and the appeal was heard in his absence.

Section 45(i) of the Enactment reads:—

> "A person who drives a motor vehicle on a public thoroughfare recklessly or negligently or at a speed or in a manner which is dangerous to the public having regard to all the circumstances of the case including the nature, condition and use of the thoroughfare and the amount of traffic which actually is at the time or which may be reasonably expected to be on the thoroughfare or . . .
>
> (ii) . . .
>
> (iii) . . .
>
> (iv) . . . shall be punished with imprisonment . . ."

Two questions of law arise on this appeal—

(i) whether this charge contravenes the provisions of section 163 of the Criminal Procedure Code (Cap. 6), and

(ii) if it does is it an illegality, or an irregularity to which the provisions of section 422 of the Criminal Procedure Code may be applied.

Section 163 of the Code reads:—

> "For every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately, except in the cases mentioned in sections 164, 165, 166 and 170."

The question then becomes—How many distinct offences are contained in section 45(i) of the Enactment and in particular, in reference to the present charge, do the words "recklessly or negligently" create one offence or two distinct offences.

In my view, this section contains four distinct offences; the use of the word "or" is disjunctive; and in particular the words "recklessly or negligently" create two distinct offences:—

(i) to drive a motor vehicle recklessly; and

(ii) to drive a motor vehicle negligently.

The word "reckless" connotes a positive, active, mental condition, a certain wilfulness, a conscious disregard of consequences in doing an act.

The word "negligent" connotes a negative mental condition a failure to do something, an omission to take due care and precaution.

It is, I would think, quite clear that a driver might be "negligent" in many ways without being "reckless."

It is apposite to quote the words used by Lord Atkin in his judgment in the case of *Andrews* v. *Director of Public Prosecutions*, (H.L. April 22, 1937). This was a case of manslaughter by the driver of a motor-van. The following passage is relevant:—

> "Simple lack of care such as will constitute civil liability is not enough: for purpose of the criminal law there are degrees of negligence and a very high degree of negligence is required to be proved before the felony (manslaughter) is established. Probably of all the epithets that can be applied "reckless" most nearly covers the case. It is difficult to visualise a case of death caused by 'reckless' driving in the connotation of that term in ordinary speech which would not justify a conviction for manslaughter, but it is probably not all embracing, for "reckless" suggests an indifference to risk whereas the accused may have appreciated the risk and intended to avoid it and yet shown such a high *degree of negligence* in the means adopted to avoid the risk as would justify a conviction."

Charges of offences under the Motor Vehicles Enactment are tried summarily and the provisions of section 173 of the Criminal Procedure Code apply Section 173(a) reads:—

> "When the accused appears or is brought before the Court a charge containing the particulars of the offence of which he is accused shall be framed and read and explained to him, and he shall be *asked whether he is guilty of the offence charged* or claims to be tried."

It is impossible to make a simple plea of "guilty" to the charge in this case; and that shows clearly that the charge is bad—it is an illegal charge because it contains two distinct offences contrary to the provisions of section 163 of the Criminal Procedure Code. A charge must contain one offence and no more.

In a case such as the present an accused might well realise that he had been negligent in his driving and be quite ready to admit and plead guilty to negligence; while he would not consider he had been "reckless" and would not plead guilty to such. It is, therefore, impossible for him to plead guilty.

In a case such as this there is an express provision of the Code available, which should be applied, i.e. section 166 which reads:—

> "If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences; and any number of such charges may be tried at once or he may be charged in the alternative with having committed some one of the said offences."

Finally I do not consider that this is an irregularity curable under section 422 of the Code which provides that

> ". . . no finding, sentence, or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of any error, omission, or irregularity in the . . charge . . . unless such error, omission, . . . or irregularity has occasioned a failure of justice."

This is not such an error, omission, or irregularity. It is a contravention of an express provision of the Code, i.e. section 163; it is a matter of substance and not of form; it creates uncertainty and embarrassment; it is a charge to which it is impossible to make a simple plea; it is an illegality.

I consider this appeal should be allowed; the conviction and sentence set aside and the fine (which has been paid) refunded.

*Appeal allowed.*

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[ORIGINAL CIVIL JURISDICTION]

AITKEN, J.

September 13, 1937.

*In re* **Estate of Haji Teh Hawa binte Haji Abdulrahman deceased.**

**THE OFFICIAL ADMINISTRATOR, F.M.S.** **Applicant.**

**vs.**

**HAJI ABDUL MAJID BIN SHAHABUDIN** **Respondent.**

[IPOH ORIGINATING SUMMONS No. 232 of 1937]

*Probate and Administration Enactment (Cap. 8) S. 102—Administrator's duties—power of sale of intestate's immovable property—overriding effect of the Malay Reservations Enactment (Cap. 142) S. 15.*

H. T. H. died intestate on the 9th November 1932. Letters of Administration were granted to, but not extracted, by her son H.A.M. The estate of the deceased consisted of her interest in 4 lots of land and part interest in two other lots of land in Rungkup. The estate was indebted to one T.L.N. in the sum of $3,262.84. In 1937 the grant of Letters of Administration to H.A.M.